

1 Q Are there any -- let me refer you to the second
2 paragraph on this page that we were talking about.

3 MR. THOMPSON: Sir, just for clarification, we're on
4 Appendix D as in David, the liquidity analysis or are we still
5 on --

6 MR. MILLER: No, we're on F.

7 MR. THOMPSON: We're on F.

8 MR. MILLER: Right.

9 MR. THOMPSON: And the same -- by the same page, you
10 mean the last page of --

11 MR. MILLER: The last page of the document.

12 MR. THOMPSON: In Appendix F.

13 WITNESS: The one that begins adjustments?

14 MR. THOMPSON: It's the page that has the fine
15 print. Is that right?

16 MR. MILLER: Right.

17 BY MR. MILLER:

18 Q You see in that paragraph, the second sentence says,
19 "No adjustments are necessary for those costs which are
20 normally paid by sellers as a result of tradition or law in a
21 market area; these costs are readily identifiable ..."? Do
22 you see that sentence?

23 A Yes.

24 Q Are you familiar with what costs are normally paid
25 by sellers in this purchase of cooperative apartments in New

1 | York as a result of tradition or law?

2 | A No, I'm not, sir.

3 | Q I'm through with that page. You have claimed in
4 | your direct case that you read and relied on the instructions
5 | to FCC Form 301 in certifying your financial qualifications
6 | when you filed your application. Is that correct?

7 | A That's right.

8 | Q Now, included in that reliance was your
9 | interpretation that you did not need a written document
10 | supporting Mr. Dailey's loan commitment. Is that correct?

11 | A Yes. That's right.

12 | Q Do you recall that I raised this question of the
13 | lack of documentation in a petition to enlarge issues in 1993?

14 | A Yes.

15 | Q And do you recall that you were involved in
16 | preparing an opposition to that petition?

17 | A I don't remember.

18 | Q You filed an opposition to my petition to enlarge,
19 | didn't you?

20 | A Yes, yes.

21 | Q And in fact, you prepared and signed an affidavit
22 | which was included in that opposition, didn't you?

23 | A I don't recall whether I prepared it. If my
24 | signature appears on it, I -- then I signed it.

25 | Q You prepared a statement for Mr. Dailey to sign

1 | which was included in your opposition, though, didn't you?

2 | A That was with my Petition to Relieve to Amend,
3 | wasn't it?

4 | Q Well, you prepared --

5 | JUDGE FRYSIK: Are you testing her memory here or
6 | are you indicating -- are you referring to some exhibit?

7 | MR. MILLER: Let me show the witness a document
8 | entitled Opposition of Selznick to Petition to Enlarge and
9 | this was --

10 | MR. THOMPSON: September 16th.

11 | MR. MILLER: -- September 16th and I show her what
12 | is marked as Appendix A to this document. Here's the
13 | document. Here's Appendix A.

14 | BY MR. MILLER:

15 | Q Would you agree that Appendix A is a statement made
16 | by Mr. Dailey under penalty of perjury?

17 | A Yes.

18 | Q And you prepared that statement for him, didn't you?

19 | A Yes, I did.

20 | Q Now, did you also have occasion to review the
21 | argument that your counsel made, the actual opposition to the
22 | petition, before it was filed with the Commission?

23 | A I'm certainly -- I'm certain I must have.

24 | Q Now, there was a corrected affidavit filed September
25 | 17th of yours and I'd like to show you that and ask if you

1 recognize it.

2 JUDGE FRYSIAK: Whose affidavit is that?

3 MR. MILLER: Ms. Selznick's.

4 WITNESS: Mine. Yes.

5 MR. MILLER: Now, I'd like you to take your time and
6 look at the corrected affidavit and the opposition for
7 pleading and would you tell me if there's any mention anywhere
8 in there about reliance on instructions to Form 301?

9 MR. THOMPSON: Your Honor, can we go off the record
10 a minute? I'd like to read those documents myself.

11 JUDGE FRYSIAK: Beg your pardon?

12 MR. THOMPSON: Can we go off the record a minute?
13 I'd like to read those documents myself while the witness is.

14 JUDGE FRYSIAK: All right.

15 (Off the record at 11:32 a.m. Back on the record at
16 11:34 a.m.)

17 MR. THOMPSON: I'd like just another minute or two,
18 Your Honor, if I could. Just a couple of minutes.

19 (Off the record at 11:34 a.m. Back on the record at
20 11:35 a.m.)

21 JUDGE FRYSIAK: We're back on the record. Mr.
22 Miller, do you have a question?

23 BY MR. MILLER:

24 Q Do you remember the question, Ms. Selznick?

25 A Sort of.

1 Q All right. You've now reviewed your opposition. Is
2 there any mention in which you reviewed of reliance on the
3 instructions to Form 301?

4 A Not specifically, no.

5 Q In fact, there's not even a mention specifically of
6 the instructions to Form 301, is there?

7 A No, nor do I see cases that we've cited since on the
8 same topic. But we do make the point that no such formal loan
9 document need be obtained for an applicant to be reasonably
10 assured of its financial qualifications prior to filing the
11 application and so as I see it, we made the argument. We may
12 not have put in the citations for the argument, but we did
13 make the argument.

14 Q Well, you did put in citations for the argument,
15 though, didn't you? You cited cases.

16 A Not at that point in the -- in what I'm looking at.
17 I'm looking at a sentence up here.

18 Q So you made -- so your statement is you made a
19 statement without citation.

20 A I don't know that I --

21 Q Your counsel.

22 A Yes.

23 Q Without giving any authority, you made a statement
24 -- your counsel made a statement.

25 JUDGE FRYSIK: I don't think I caught the last part

1 of your comment. Without any authority for what?

2 MR. MILLER: Well, there was no citation of author-
3 ity for the statement.

4 JUDGE FRYSIK: Okay. I got you.

5 MR. MILLER: The statement was made, but there was
6 no citation given, without authority for that statement. Now,
7 I'd like to show you pages from the instructions to FCC Form
8 301, the June 1989 edition.

9 MR. THOMPSON: I'd like to see what you're showing
10 the witness, please.

11 MR. MILLER: Sure. Pages 1, 5, and 6.

12 BY MR. MILLER:

13 Q Have you ever seen this before?

14 A If these are the ones that I would've had at that
15 time, yes.

16 Q How did you obtain them?

17 JUDGE FRYSIK: I didn't hear the question.

18 MR. MILLER: How did you obtain them initially?

19 JUDGE FRYSIK: You're talking about the
20 instructions?

21 MR. MILLER: Yes.

22 WITNESS: I believe my counsel sent them to me.

23 BY MR. MILLER:

24 Q And you testified -- it's your testimony today that
25 you saw them before you filed your application in 1991,

1 correct?

2 A Oh, yes.

3 Q And you read them.

4 A Certainly that -- the financial qualifications part,
5 yes.

6 Q Let's -- and I'm sorry I only have one copy with me.
7 Let's turn to the financial qualifications part. Did you read
8 Paragraph B of instructions for Section 3, financial
9 qualifications? You can read that to yourself.

10 A Yes, I believe I did.

11 Q And that states in part, does it not, "In so-
12 certifying," meaning certifying your financial qualifications,
13 "the applicant is also attesting that it can and will meet all
14 contractual requirements, if any, as to collateral guarantees,
15 donations, and capital investments." And you read that
16 sentence before you filed your application, correct?

17 A Yes.

18 Q Now, before you filed your application, did you have
19 specific discussions with Mr. Dailey about what collateral or
20 guarantees he might require should he make a loan to you?

21 A No, but it was understood.

22 Q You had no specific discussions?

23 A No, we didn't.

24 Q Now, let me direct your attention to Item 3 on Page
25 6 which begins, "The applicant must also have on hand at the

1 time it files its application ..." and ask if you reviewed
2 that paragraph and what follows before you filed your
3 application.

4 A I'm sorry. Which one?

5 Q Paragraph 3.

6 A Paragraph 3, Section --

7 Q On Page 6.

8 A Oh, okay. Yes.

9 Q And did you review Paragraph C which says, "For each
10 person who has agreed to furnish funds ..."?

11 A Yes.

12 Q And does Mr. Dailey qualify as a person who had
13 agreed to furnish funds?

14 A Yes.

15 Q Now, would you agree with me that these instructions
16 say that you had to have on-hand at the time you filed your
17 application a balance sheet or financial statement showing all
18 liabilities and current and liquid assets sufficient to meet
19 current liabilities?

20 A Yes.

21 Q Would you also agree that you had to have on-hand at
22 the time you filed your application a document showing Mr.
23 Dailey's net income tax after federal income tax received for
24 the past two years?

25 A Net income after federal income tax.

1 Q Yes. In documentary form on-hand.

2 A The following documentation on-hand.

3 Q Right. Did you, in fact, at the time that you filed
4 your application, have a document in-hand which contained all
5 of Mr. Dailey's liabilities and current and liquid assets?

6 A In-hand?

7 Q In-hand.

8 A No.

9 Q Did you have in-hand any document --

10 JUDGE FRYSIK: Are you saying physically present in
11 a hand? Is that what you're saying?

12 MR. MILLER: Well, in her possession. In her
13 possession a document. In her -- not necessarily holding onto
14 it, but in her possession a document showing all of Mr.
15 Dailey's liabilities and his current and liquid assets.

16 MR. THOMPSON: Your Honor, I didn't object because
17 he changed his wording toward the end. He shifted from on-
18 hand, which is what the form says, to in-hand and I'd just
19 note, as I think Your Honor did, that therefore, there was a
20 jump and when the witness answered her answer --

21 JUDGE FRYSIK: Can you rephrase your question?

22 MR. MILLER: I will rephrase it.

23 BY MR. MILLER:

24 Q Did you have on-hand a document giving Mr. Dailey's
25 -- all of his liabilities and his current and liquid assets?

1 A I believe I did. I interpreted that to mean that it
2 was readily available to me and it was.

3 Q I understand what your interpretation is. My
4 question is simply did you have such a document on-hand?

5 A Well, then, yes.

6 Q Under your interpretation.

7 A Under my interpretation, yes.

8 Q Did you have any writing which stated Mr. Dailey's
9 net income after federal tax which he received for the past
10 two years when you filed your application?

11 A Did I have a writing?

12 Q A writing which stated Mr. Dailey's net income after
13 federal tax received for the previous two years?

14 A In my possession?

15 Q In your possession.

16 A No.

17 Q And did you have a writing in your possession which
18 contained all of Mr. Dailey's liabilities and current and
19 liquid assets? A writing.

20 A In my files?

21 Q In your possession, right, a written document.

22 A No.

23 JUDGE FRYSIK: Is that what you understand by
24 possession, being in your files? Is that what your
25 understanding is?

1 WITNESS: I didn't interpret that instruction as it
2 necessarily being in my possession. I interpreted it as
3 meaning on-hand, readily available to me.

4 BY MR. MILLER:

5 Q At the time that you filed your application, had you
6 seen a written document containing all of Mr. Dailey's
7 liabilities?

8 A Seen with my eyes?

9 Q Seen with your eyes a written document.

10 A No.

11 Q Had you seen with your eyes a written document
12 stating his net income after federal income tax for the past
13 two years?

14 A No.

15 Q Now, let me show you again your corrected affidavit
16 of September 15, 1993 and I'd point you to Paragraph 2. Read
17 that to yourself, please. Now, that paragraph -- in that
18 paragraph, you're stating that when you filed your
19 application, you had in your possession Mr. Dailey's financial
20 statement on a computer system that you shared at Breed,
21 Abbott and Morgan.

22 A That's right.

23 Q Is that a true statement?

24 A Yes. It was on his computer at Breed, Abbott -- not
25 on mine, on his -- and I do use his computer sometimes when

1 he's not in New York.

2 Q Did you, prior to filing your application, access
3 Mr. Dailey's computer for the purpose of reviewing his
4 financial statement?

5 A No.

6 Q Now, in your original application as filed, you
7 stated that you had a commitment of \$361,000 from Mr. Dailey.
8 Would you agree with that?

9 A Yes.

10 Q Did Mr. Dailey tell you in so many words that he
11 would lend you \$361,000?

12 A I told him what the figure was and he told me that
13 he would lend that figure to me.

14 Q And what figure did you tell him?

15 A I probably said that it was about \$360,000.

16 Q Did Mr. Dailey, at any time, say, "I will lend you
17 \$361,000"?

18 A He told me he that he would lend me what was
19 necessary and I told him that it was approximately \$360,000.

20 JUDGE FRYSIK: I don't know whether she's
21 responsive to your question. Did she answer you?

22 MR. MILLER: I think the question could be answered
23 yes or no.

24 JUDGE FRYSIK: Would you state it again?

25 BY MR. MILLER:

1 Q Did Mr. Dailey say, "I will lend you \$361,000" or
2 words -- similar words using that exact number?

3 A Did he say the number? No, he didn't.

4 Q Did you give him the number, the exact number
5 \$361,000?

6 A Probably not.

7 Q On what basis did you put the number \$361,000 into
8 your application?

9 A It was based on my initial capital outlay budget and
10 my first three months' operating expenses, which came out to
11 something like \$360,070, and it was rounded up.

12 Q So you took your -- what you had arrived at as an
13 estimate of your construction and first three months'
14 operating costs, added a little more to it, and put that down
15 as the amount that Mr. Dailey would be providing you. Is that
16 correct?

17 A That's right. After having heard Mr. Dailey's
18 promise to provide me the money.

19 Q I would like to show you three pages of documents
20 that were supplied to me in discovery. These are documents
21 that I had numbered 71, 72, and 73 entitled Budget and I'll
22 show it to your counsel, first. Let me show you this document
23 and ask if you've seen it before.

24 A Yes, I created this.

25 Q Was that created before your application was filed?

1 A Yes.

2 Q And was that the basis on which you arrived at the
3 cost to construct and initially operate your station?

4 A I believe so.

5 Q Now, is there a provision in your budget for loan
6 repayments during the first three months of operation?

7 A Yes, there is.

8 Q So at the time you created this budget, you had an
9 understanding that there would be loan repayments during the
10 first three months of operation. Is that correct?

11 A I'm trying to think. I guess -- yes, at the time I
12 created the budget. That's right. I hadn't --

13 Q That's sufficient.

14 MR. THOMPSON: Well, if the witness wants to make a
15 more complete response, I think she should be allowed to.

16 MR. MILLER: Well, counsel will have a chance on
17 redirect.

18 MR. THOMPSON: Well, that's right. But also if the
19 answer to one of your questions is a more complete statement
20 than the witness was allowed to give, she should be able to
21 answer your question fully without my having to ask her
22 anything on redirect.

23 JUDGE FRYSIK: I'll permit the witness to clarify
24 her statement.

25 WITNESS: I prepared that budget early on in the

1 application process, before I really even investigated
2 anything about loans, and that was not a precise figure.

3 JUDGE FRYSIK: All right. You may ask her.

4 BY MR. MILLER:

5 Q Now, when you arrived at your cost estimate of
6 \$360,070, did that cost include sales taxes or freight
7 charges, shipping charges on the equipment?

8 A I'm not certain. I had asked Dean Heinen, who is a
9 technical person, to research the cost of the equipment and
10 give me amounts for each piece of equipment and that's what he
11 gave me. I'm not certain whether that included sales tax or
12 didn't.

13 Q Did you ask him?

14 A No, I didn't.

15 Q Let me, again, refer you to the instructions to Form
16 301 and point out Paragraph D(1)(a) of Page 5. Mr. Thompson,
17 do you want to see this first?

18 MR. THOMPSON: (Shakes head no.)

19 BY MR. MILLER:

20 Q And ask you to review that and indicate whether you
21 read that before you filed your application. Just that first
22 paragraph.

23 A Yes.

24 Q And does that paragraph --

25 A I'm sorry. The question was did I --

1 Q Did I read that paragraph before you filed the
2 application?

3 A I don't recall if I read that one.

4 Q Do you recall if you discussed that paragraph with
5 anyone prior to your filing the application?

6 A I'm fairly certain I did not.

7 Q Would you agree, however, that the paragraph calls
8 for the inclusion of freight in the cost of equipment?

9 A Yes.

10 Q In fact, the cost for the equipment is to include
11 them in place and ready for service. Is that correct?

12 A Yes.

13 Q Would payment of sales tax be included in the cost
14 of equipment as it would be in place and ready for service?

15 A I would assume so.

16 Q When you filed this application, did you know what
17 the sales tax rate was in California?

18 A No.

19 MR. THOMPSON: Objection to the question. It's not
20 clear and it's not established by any foundation that the
21 equipment would be purchased in California or that if
22 purchased out of state, California would, in fact, tax it.
23 Lack of foundation. My wife buys lots of --

24 JUDGE FRYSIK: If she can answer it -- I think
25 perhaps the onus is on you, Mr. Thompson, to show that there

1 was no need to pay the sales tax.

2 MR. MILLER: Thank you, Your Honor.

3 BY MR. MILLER:

4 Q Now, in your budget of which you arrived at the
5 \$360,070 figure, did you include a provision for payment of
6 the Commission's \$6,000 hearing fee?

7 A Do you have the budget?

8 JUDGE FRYSIK: It was \$361,000. Or you're asking
9 for the budget.

10 WITNESS: Right. Thank you. My understanding when
11 I filed this budget was that the installation costs that I
12 allowed for were very, very high and that I would be able to
13 take -- that it wouldn't really cost that much and that I
14 would be able to take some of the money that I had set aside
15 for that or some other things like legal expenses and
16 something else like that. Well, the hearing fee, no. I'm
17 sorry. I take that back.

18 BY MR. MILLER:

19 Q When you filed your application, were you not aware
20 that there would probably be at least one competing
21 application filed?

22 A No, I wasn't aware of that.

23 Q Had not you spoken to Mr. Neely of my office about
24 representation and he indicated that he already had a client
25 who was interested in filing for the El Rio channel?

1 A That's true. I did know that.

2 Q Did you have a provision in your budget for payment
3 of other FCC fees such as fee to file the application for a
4 broadcast station license or the fee to file an application
5 for a studio transmitter license?

6 A No. And I guess my -- what I was trying to say
7 before really applies to that more than the hearing fee, that
8 I knew at the time that I filed that my installation budget
9 was very high. It's in the \$80 to \$90,000 range and I was
10 told before I put in my application that that was extraordi-
11 nary, but there was no need to change it. I could use that
12 money to apply to other things like legal expenses or fees.

13 Q You indicated that you obtained a lot of the
14 information on this budget from Mr. Heinen. Did you obtain
15 the cost estimates for installation from Mr. Heinen?

16 A Yes.

17 Q Did Mr. Heinen indicate that his cost estimates for
18 installation were excessive?

19 A No.

20 Q Who told you that Mr. Heinen's cost estimates were
21 excessive?

22 A Mr. Tannewald.

23 Q Did Mr. Tannewald indicate on what basis he arrived
24 at that conclusion?

25 A How far are we going to get into Mr. Tannewald's

1 conversation with me? I can answer that question. I just --
2 let me answer -- the answer is -- should I answer it?

3 MR. THOMPSON: Yeah. I mean, I think you're --
4 you're not waiving -- in my judgement, you're not waiving the
5 privilege because he's asking about a factual matter and --
6 let's go off --

7 JUDGE FRYSIK: What was the question?

8 MR. THOMPSON: The question was about the basis --
9 he asked a question about why did she think that the estimates
10 were high and the answer to why Mr. Heinen's estimates were
11 high was that Mr. Tannewald told her they were high.

12 MR. MILLER: And the question now is what basis did
13 Mr. Tannewald give Ms. Selznick for concluding that Mr.
14 Heinen's estimates were high and the witness is concerned
15 about raising the attorney/client privilege. I have no
16 objection to going off the record and letting her consult with
17 her counsel before she responds.

18 MR. THOMPSON: And I'd like to do that. I don't
19 personally believe at this point, but I would like to discuss
20 it with the witness because we don't want to waive the
21 privilege. It's her privilege and I'd like to be certain that
22 she --

23 JUDGE FRYSIK: Why don't we break for lunch? And
24 come back at 1:15.

25 (Whereupon, a recess was taken for lunch from 12:08

1 p.m. until 1:15 p.m.)
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1 A F T E R N O O N S E S S I O N

2 JUDGE FRYSIAK: We're on the record.

3 MR. MILLER: Your Honor, I'd like to withdraw the
4 question that was pending.

5 JUDGE FRYSIAK: Consider it withdrawn.

6 MR. MILLER: I do have a question along those lines,
7 though.

8 BY MR. MILLER:

9 Q Ms. Selznick, would you refer to Page 3 of your
10 Exhibit 4, please?

11 A The one that starts with Broadcasting Magazine?

12 Q Yes. In Paragraph Number 7 -- and I believe we
13 discussed this during the admissions portion of the proceeding
14 this morning. I refer you to the two places where you mention
15 discussions with Mr. Tannewald.

16 A Right.

17 Q Beginning at the end of the seventh line down, "...
18 and also discussing the application with my counsel, Peter
19 Tannenwald, Esquire ..." and then another four lines further
20 down, "... I told him, based on my study of the instructions
21 to FCC Form 301 and from my discussion with my counsel ..."
22 Now, if I were to ask you about the details of your discus-
23 sions with Mr. Tannenwald, would you assert the attorney/
24 client privilege?

25 A Yes.

1 MR. MILLER: And just for clarification, Your Honor
2 is ruling that this is a proper invocation of the privilege,
3 despite the testimony in her direct case exhibit?

4 JUDGE FRYSIAK: You're asking for the contents of
5 that discussion.

6 MR. MILLER: Yes, yes. Even though she states that
7 she makes her actions based on that discussion.

8 JUDGE FRYSIAK: What is germane is her action, the
9 basis of it. She may be wrong, but that's something that she
10 proceeds at her own risk. She is taking an action pursuant to
11 certain events. One of them is a discussion with her
12 attorney.

13 MR. MILLER: Your Honor, what I'm going for is on
14 the misrepresentation issue, if I'm correct, the applicant's
15 good faith is a consideration as to whether there was any
16 misrepresentation or not and I believe the purpose of these
17 statements in her direct case is to try to indicate good
18 faith, even if it was found to be an improper certification,
19 that she based her action, at least in part, on discussions
20 with her counsel.

21 And I believe -- and I cited the case in my recent
22 request for documents where the Review Board has gone into the
23 invocation of the attorney/client privilege in the face of a
24 misrepresentation issue, that it's highly suspect as to
25 whether the applicant can invoke the -- and continue to invoke

1 the privilege in the face of a misrepresentation issue. At
2 the minimum -- and I can argue this in my findings -- I would
3 say that the failure to disclose the contents of the
4 conversation can only be read against the interest of the
5 application.

6 MR. THOMPSON: Your Honor, I appreciate the speech,
7 the discussion that Mr. Miller has given. It's totally
8 inappropriate for this forum right now. In essence, he's
9 really asking you for reconsideration of both your order that
10 was dated the tenth and released today as well as your order
11 earlier this morning. I appreciate everything you've said,
12 Jerry, but I think that Mr. Miller's argumentation should be
13 left for his proposed findings.

14 JUDGE FRYSIK: Well, that's true. But then there
15 are -- there is other indicia here of representations. It
16 isn't just solely based on the discussion with the attorney.

17 MR. MILLER: No, but it -- that does form one basis.

18 JUDGE FRYSIK: So you're saying that as long as one
19 cog is missing, well, the whole thing falls.

20 MR. MILLER: No, I'm not -- I'm not saying that.
21 I'm saying that if she had said, "Based on my study of the
22 instructions, I determined ..." then I would have no problem.
23 But if she is going to, in her direct case, include "from my
24 discussion with my counsel" -- if she's going to include that
25 as probative element -- evidence, then she is somehow going to

1 seek to rely on that as a showing of good faith.

2 If -- and earlier this morning -- and with all due
3 respect for Mr. Thompson, I do not seek reconsideration of
4 Your Honor's ruling because that had to do with the lack --
5 with the failure of the direct case to discuss documents.
6 This now is all discussions. The witness is here for cross
7 examination. She is saying and testifying, "From my discus-
8 sion with my counsel, I certify that I was financially
9 qualified ...," and she -- I think if she's going to have that
10 in as evidence, as one of the bases on which she relied, she
11 cannot hide -- use that --

12 JUDGE FRYSIAK: You're addressing one prong of the
13 argument. The two prong is that one, whether she misrepre-
14 sented the fact that she was certified -- that she was
15 qualified when she, in fact, knew she was not and the second
16 one is whether she, in fact, technically was qualified or not.
17 You're saying that misrepresentation hits both prongs. Well,
18 it doesn't. This addresses only the second technical point.
19 Discussion with counsel may relate only to the technicality of
20 qualification --

21 MR. THOMPSON: Your Honor, there's one more point,
22 too, if I could just --

23 JUDGE FRYSIAK: -- and it doesn't relate to the
24 intent of the individual.

25 MR. MILLER: Well, Your Honor --

1 MR. THOMPSON: I'd just like to make before -- I'd
2 like to respond on the record very briefly. What Mr. Miller
3 is really doing is saying that if he were trying our case, he
4 might try it differently and if he wants to argue that our
5 failure to put in documents that were privileged should be
6 construed against us, well, I mean, he's already told us
7 that's what he wants to argue and he --

8 JUDGE FRYSIAK: Or even if she -- even if she's
9 going to rely on this misrepresentation on the discussion with
10 her counsel, if that, in your opinion is erroneous, well, so
11 be it. But that doesn't preclude her from relying on other
12 aspects, other indicia.

13 MR. MILLER: No. And I'm not --

14 JUDGE FRYSIAK: And I see what you're saying, but --

15 MR. MILLER: My argument will be --

16 JUDGE FRYSIAK: But despite all that, I will
17 overrule your objection.

18 MR. MILLER: My request was only to strike the words
19 "from my discussion with my counsel," to strike the reference
20 to discussions with her counsel from her direct case. That's
21 what my request is at the present time.

22 MR. THOMPSON: That's -- well, it was ruled on
23 earlier by the Judge. You're asking him on the basis, I
24 suppose, of some testimony and I don't even understand the
25 procedure by which you're asking him to reconsider one of his